Federal Court  Cour fédérale

Date: 20150807

Docket: T-955-10

Citation: 2015 FC 956

Ottawa, Ontario, August 7, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SHELDON BLANK

Applicant

and

THE MINISTER OF JUSTICE

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 41 of the *Access to Information Act*, RSC 1985, c A-1 [Act] for judicial review of the Department of Justice's [DOJ] refusal to disclose certain records in response to the Applicant's request for access under the Act.

II. BACKGROUND

[2] This is the latest in a long line of applications by Mr. Blank under s 41 of the Act seeking access to information that was not disclosed to him when he made a request for disclosure.

[3] The general context for Mr. Blank's requests for information and s 41 applications was summarized by the Federal Court of Appeal as long ago as 2004 in *Blank v Canada (Minister of Justice)*, 2004 FCA 287 [*Blank* FCA 2004]:

> [5] On October 17, 1997, the appellant made a first request to the Access to Information and Privacy Office (Office) of the Department of Justice to obtain all records pertaining to his prosecution and the prosecution of Gateway Industries Ltd. (Gateway) for regulatory offences under the *Fisheries Act*, R.S.C. 1985, c. F-14 and the *Pulp and Paper Effluent Regulations*, SOR/92-269.
>
> [6] The appellant was a Director of Gateway which operated a paper mill in the city of Winnipeg. Thirteen (13) charges were laid against him and Gateway in July 1995: five counts alleged pollution of the Red River and eight pertained to breaches of the reporting requirements of the *Fisheries Act*. A judicial saga regarding the prosecution of these charges ensued thereafter. Suffice it to say that the eight charges relating to the reporting requirements were quashed in April 1997 by the Manitoba Provincial Court. The prosecution continued on the five summary conviction offences of pollution only to see the charges quashed by the Manitoba Queen's Bench on April 10, 2001. The Crown laid, in July 2002, new charges by way of indictment. The trial had been set for April 19, 2004 to June 25, 2004, but in February 2004 the Crown stayed the proceedings and informed the appellant that the prosecution would not be reinstated.
>
> [7] The appellant and Gateway sued the Federal Government in damages for alleged fraud, conspiracy, perjury and abuse of its prosecutorial powers. It is both in the context of the penal prosecution and the civil lawsuit that the appellant sought to access Government records pursuant to the Act.

[4] The access request behind the present s 41 application was dated June 4, 2004 and was received by the Department of Justice on June 14, 2004. It reads in relevant part as follows (Respondent's Record at 19):

> All records dealing with the continuation of the prosecution by indictment and all records dealing with the eventual decision to stay the proceedings
>
> (In the Fisheries Act prosecution against me and my company Gateway Industries Ltd.)

[5] The request was processed and some seven hundred and ninety-eight (798) pages were released to Mr. Blank on March 30, 2007. Portions of the materials captured by the request were not released by virtue of s 19(1) of the Act (personal information), s 21(1) (government advice, recommendations, consultation or deliberation), and s 23 (solicitor-client privilege). These portions were redacted. Some documents were withheld in their entirety in reliance on the same exemptions.

[6] Mr. Blank made a complaint to the Office of the Information Commissioner of Canada [ICC] on August 1, 2007 pursuant to s 30 of the Act on the basis of "improper severing and improper exemptions." This resulted in the release of some of the information that had initially been redacted.

[7] In May 2010, the ICC completed its investigation into the Applicant's complaint. It concluded that portions of the Applicant's complaint were well founded: the DOJ had failed to meet statutory deadlines, and some of the information disclosed following the complaint had not

properly been exempted. The ICC determined that personal information had been properly withheld under s 19, and that ss 21(1), 23 and 25 had been properly applied.

[8] In June 2010, the Applicant brought a s 41 application to have the Court review the undisclosed records. The Applicant challenges the DOJ's use of the ss 21(1) and 23 exemptions; its exercise of discretion not to disclose the records; and, the DOJ's application of s 25 of the Act (severability).

III. ISSUES

[9] The Applicant raises the following issues in this proceeding:

1. Whether the Court should accord deference to the ICC's findings;
2. Whether the DOJ discharged its duty to assist under s 4(2.1) of the Act;
3. Whether the DOJ can claim solicitor-client privilege over records which demonstrate abuse of process and other blame-worthy conduct; and,
4. Whether any prosecutorial misconduct breached the Applicant's ss 7 and 24 rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[10] The Respondent submits that there are only two issues before the Court in a s 41 application. The first is whether the claimed exemption from disclosure was properly invoked. The second is whether the discretion to not disclose a record was properly exercised.

IV. STATUTORY PROVISIONS

[11] The following provisions of the Act are applicable in this proceeding:

Responsibility of government institutions

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,

has a right to and shall, on request, be given access to any record under the control of a government institution.

[…]

Right to access to records

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

[…]

Responsable de l'institution fédérale

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

a) les citoyens canadiens;

b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

[…]

Droit d'accès

(2.1) Le responsable de l'institution fédérale fait tous les efforts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.

[…]

Advice, etc.

21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown,

(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,

[…]

if the record came into existence less than twenty years prior to the request.

[…]

Solicitor-client privilege

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

[…]

Severability

25. Notwithstanding any other provision of this Act, where a

Avis, etc.

21. (1) Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :

a) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;

b) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel;

[…]

Secret professionnel des avocats

23. Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

[…]

Prélèvements

25. Le responsable d'une institution fédérale, dans les

request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

[…]

Review by Federal Court

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

[…]

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or

cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[…]

Révision par la Cour fédérale

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[…]

Charge de la preuve

48. Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge

42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

[…]

[…]

Costs

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Frais et dépens

53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

Idem	**Idem**
(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.	(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

[12] The following provisions of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] are applicable in this proceeding:

When cross-examination may be made	**Contre-interrogatoire de l'auteur d'un affidavit**
84. (1) A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.	84. (1) Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.
Filing of affidavit after cross-examination	**Dépôt d'un affidavit après le contre-interrogatoire**
(2) A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of	(2) La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la

the Court.

[…]

Applicant's affidavits

306. Within 30 days after issuance of a notice of application, an applicant shall serve its supporting affidavits and documentary exhibits and file proof of service. The affidavits and exhibits are deemed to be filed when the proof of service is filed in the Registry.

[…]

Applicant's record

309. (1) An applicant shall serve and file the applicant's record within 20 days after the day on which the parties' cross-examinations are completed or within 20 days after the day on which the time for those cross-examinations is expired, whichever day is earlier.

[…]

Contents of applicant's record

(2) An applicant's record shall contain, on consecutively numbered pages and in the following order,

(a) a table of contents giving the nature and date of each document in the record;

Cour.

[…]

Affidavits du demandeur

306. Dans les trente jours suivant la délivrance de l'avis de demande, le demandeur signifie les affidavits et pièces documentaires qu'il entend utiliser à l'appui de la demande et dépose la preuve de signification. Ces affidavits et pièces sont dès lors réputés avoir été déposés au greffe.

[…]

Dossier du demandeur

309. (1) Le demandeur signifie et dépose son dossier dans les 20 jours suivant la date du contre-interrogatoire des auteurs des affidavits déposés par les parties ou dans les 20 jours suivant l'expiration du délai prévu pour sa tenue, selon celui de ces délais qui est antérieur à l'autre.

[…]

Contenu du dossier du demandeur

(2) Le dossier du demandeur contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après :

a) une table des matières indiquant la nature et la date de chaque document versé au dossier;

(b) the notice of application;	b) l'avis de demande;
(c) any order in respect of which the application is made and any reasons, including dissenting reasons, given in respect of that order;	c) le cas échéant, l'ordonnance qui fait l'objet de la demande ainsi que les motifs, y compris toute dissidence;
(d) each supporting affidavit and documentary exhibit;	d) les affidavits et les pièces documentaires à l'appui de la demande;
(e) the transcript of any cross-examination on affidavits that the applicant has conducted;	e) les transcriptions des contre-interrogatoires qu'il a fait subir aux auteurs d'affidavit;
(e.1) any material that has been certified by a tribunal and transmitted under Rule 318 that is to be used by the applicant at the hearing;	e.1) tout document ou élément matériel certifié par un office fédéral et transmis en application de la règle 318 qu'il entend utiliser à l'audition de la demande;
(f) the portions of any transcript of oral evidence before a tribunal that are to be used by the applicant at the hearing;	f) les extraits de toute transcription des témoignages oraux recueillis par l'office fédéral qu'il entend utiliser à l'audition de la demande;
(g) a description of any physical exhibits to be used by the applicant at the hearing; and	g) une description des objets déposés comme pièces qu'il entend utiliser à l'audition;
(h) the applicant's memorandum of fact and law.	h) un mémoire des faits et du droit.

V. SUBMISSIONS

A. *Applicant*

[13] The Applicant submits that the Court should give little deference to the ICC's findings. He says that the author of the report was in a conflict of interest because in a previous position

with the DOJ, she dealt with several of the Applicant's requests. In that position, documents that she withheld from the Applicant were ultimately released. As a result, the Applicant alleges that the report's author was biased. He says that the delay in releasing the report also demonstrates bias.

[14] The Applicant also asks the Court to afford no deference to the DOJ's exercise of discretion. He says that refusals which arose during cross-examination on an affidavit in this proceeding demonstrate that the DOJ was not fulfilling its duty to assist under s 4(2.1) of the Act.

[15] The Applicant also submits that the DOJ has wrongly claimed both ss 21(1)(b) and 23 exemptions when documents exempted are protected only by litigation privilege which has come to an end: *Blank v Canada (Minister of Justice)*, 2006 SCC 39 [*Blank* SCC 2006]. He says that disclosure problems have persisted since the criminal prosecution contrary to the Crown's obligations under *R v Stinchcombe*, [1991] 3 SCR 326 and *Krieger v Law Society of Alberta*, 2002 SCC 65 [*Krieger*]. The criminal prosecution is long over and these documents should be released.

[16] Finally, the Applicant submits that the DOJ cannot claim privilege over documents that demonstrate abuse of process and other blame-worthy conduct which breached his ss 7 and 24 rights under the *Charter*: *R v Nixon*, 2011 SCC 34. He says that the Crown laid criminal charges against him and his company for improper political motivations. He says the Crown was fully aware it could not proceed with the criminal charges but nonetheless extended the process to

some eight and a half years. The fact that the Crown offered to withdraw the charges demonstrates that the proceedings were launched for improper purposes: *Singh v Montreal (City of)*, 2014 QCCA 307.

B. *Respondent*

(1) Preliminary matters

[17] The Respondent raises two preliminary issues. First, the Respondent says that the only issue before the Court is whether the Act's exemptions were properly applied. As a result, the Court need not consider the Applicant's submissions regarding how the prosecution was conducted, the alleged bias of the ICC, and his complaints regarding the way his access request was conducted.

[18] Second, the Respondent submits that the Court should not consider the affidavits in the Applicant's Record which were filed in support of interim motions as they offend Rules 84(2), 306, and 309 of the *Federal Courts Rules*.

(2) The nature of the proceeding

[19] The Respondent submits that the Court's review is circumscribed by s 41 of the Act. The Court's authority is limited to ordering access to a particular record if the refusal to disclose the record was contrary to the Act: *X v Canada (Minister of National Defence)* (1990), [1991] 1 FC 670 at 675 (TD) [*X v Canada*]; *Connolly v Canada Post Corp* (2000), 197 FTR 161 at paras 8-10 [*Connolly*]. The Court does not have the authority to consider the manner in which government

institutions respond to requests or to grant remedies when an institution is found to be at fault: *Connolly v Canada Post Corp*, 2002 FCA 50 at paras 3-4 [*Connolly* FCA]. The Court also does not have any authority to determine whether the government institution has complied with s 4(2.1) of the Act. The Applicant's submissions require an expansive interpretation of s 41 and have been rejected by the courts: *Blank v Canada (Minister of the Environment)*, [2000] FCJ no 1620 (QL) at paras 9, 15, 19 (TD) [*Blank* FC 2000]; *Blank* FCA 2004, above, at paras 76-77; *Blank v Canada (Minister of the Environment)*, 2006 FC 1253 at para 33(g) [*Blank* FC 2006], aff'd 2007 FCA 289 [*Blank* FCA 2007].

[20] A s 41 application is not an appeal of the ICC's findings. The Court is reviewing the DOJ's decision not to disclose certain records, not the ICC's recommendations: *Blank v Canada (Justice)*, 2009 FC 1221 at para 26 [*Blank* FC 2009]. The Court has held that the ICC's report may be considered to assist the Court in its determination: *Blank v Canada (Minister of Justice)*, 2005 FCA 405 at para 12 [*Blank* FCA 2005]; *Blank* FC 2009, above, at para 26; *Blank v Canada (Justice)*, 2010 FCA 183 at para 35 [*Blank* FCA 2010].

(3) Standard of review

[21] The Respondent submits that the DOJ's determination that a record falls within an exemption is reviewable on a standard of correctness. The DOJ's discretion to not disclose a record is reviewable on a standard of reasonableness. See *Kelly v Canada (Solicitor General)* (1992), 53 FTR 147, aff'd (1993), 154 NR 319 (FCA); *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at 457-458; *Blank* FC 2009, above, at paras 27-31.

(4) Bias

[22] There is no evidence to substantiate the Applicant's allegation of bias. In contrast, the ICC actually found that a number of the Applicant's complaints were substantiated and an additional six hundred pages of information were released.

(5) Section 23 – Solicitor-client privilege

[23] The Federal Court of Appeal has held that the common law governs whether a record is privileged, while the Act governs the discretion to disclose a privileged record: *Blank* FCA 2004, above, at paras 13-15. The Respondent says that the records at issue contain legal advice and the DOJ properly determined that the records fall within the s 23 exemption. Legal advice privilege applies to all interactions between client and lawyer concerning legal advice and protects those interactions from disclosure: *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10 [*Blood Tribe*]. The non-redacted records consist of letters, memoranda and e-mail communications containing, or expressly or implicitly referencing, legal advice surrounding the two prosecutorial decisions referenced in the Applicant's request.

[24] The Respondent says that there is no recognized exception to solicitor-client privilege which would require disclosure of records establishing abuse of process. While there is an exception to criminality (see *Blood Tribe*, above, at para 10), abuse of process is not a criminal act and so the exception does not apply: *Blood Tribe*, above, at para 10; *Blank* FCA 2010, above, at paras 19-20. In addition, there is no evidence of wrongdoing in the disputed records.

[25] In reviewing the DOJ's discretion to not disclose records, the Court is only required to determine whether the discretion not to disclose was exercised in good faith. The records at issue were not disclosed in order to maintain the records' confidentiality; there is no allegation that this was not exercised in good faith.

(6) Section 21(1) - Government advice

[26] The Respondent submits that these records consist of consultations and deliberations concerning the prosecution of the Applicant. The Respondent says that the DOJ properly determined that these records contain government advice, and exercised its discretion to not disclose in good faith.

(7) Section 25 - Severance

[27] The Respondent submits that s 25 was properly applied. The disclosure of any additional information would have revealed information protected by solicitor-client privilege, or would have resulted in the release of meaningless words and phrases.

VI. ANALYSIS

A. *Introduction*

[28] As with any s 41 application, the Court is asked to determine whether the refusals to disclose were properly made. In the present case this requires an examination of whether the ss 21 and 23 exemptions were properly applied, and whether proper severance occurred under s 25.

In addition, the Applicant has asked the Court to consider whether any deference should be accorded to the Commissioner's report, whether the duty to assist under s 4(2.1) was discharged, and whether the exemptions relied upon were vitiated as a result of abuse of process and other prosecutorial misconduct that was so egregious that it violated the Applicant's rights under ss 7 and 24 of the *Charter*.

B. *The Record Before the Court*

[29] The Respondent takes issue with two (2) affidavits (affirmed February 26, 2013 and March 11, 2013) filed by the Applicant on the grounds that they were affirmed and filed in a previous interlocutory motion (to compel answers to questions asked during cross-examination) and their inclusion would breach Rules 84(2), 306, and 309 of the *Federal Courts Rules*.

[30] The Applicant alleges ignorance of the relevant rules and contends that the Respondent will suffer no prejudice if the affidavits are included.

[31] The Respondent points out that the Applicant has done this same thing in previous applications and is well aware that he is not following the proper procedure. Also, the Respondent points out that the affidavits were filed in an interlocutory motion that was dismissed. In that motion, the Respondent did not need to cross-examine on the affidavits. They have not been affirmed for this motion and they contain inadmissible hearsay upon which the Applicant wishes to rely heavily.

[32] I notice that in his recent decision of April 15, 2015 dealing with another s 41 application by Mr. Blank, Justice O'Reilly was asked to exclude two affidavits that had been proposed for purposes of a previous interlocutory proceeding but did not need to make a formal ruling because, after reviewing the documentation at issue, he found it irrelevant to the issues before him. See *Blank v Canada (Justice)*, 2015 FC 460.

[33] In the present case, I have to note that Mr. Blank is a very experienced litigant before this Court and that the issue of filing affidavits affirmed in other proceedings has been brought to his attention before. He really has not provided a justification for his failure to follow proper Federal Court practice and, because he is likely to make further applications, I do not think I can just turn a blind eye to his flouting of the rules, especially when, as the Respondent points out, this could place the Respondent at a disadvantage. Rule 84(2) bars the filing of an affidavit after the conduct of a cross-examination, and Mr. Blank cross-examined the Respondent's deponents in this application in September 2012. The additional affidavits were affirmed in February and March 2013 in support of a motion to compel answers to questions asked during the cross-examination of the Respondent's deponent. The Court may, under Rule 84(2), grant leave to file an affidavit after cross-examination and the relevant factors to consider were set out in *Pfizer Canada Inc v Rhoxalpharma Inc*, 2004 FC 1685. It is clear, however, that Rule 84(2) is intended to deal with matters that arise during cross-examination and could not have been foreseen with reasonable diligence. In *Inverhuron & District Ratepayers' Assn v Canada (Minister of the Environment)* (2000), 180 FTR 314, leave to file was refused after cross-examination where the affidavit was directed to an issue which was in the contemplation of the party from the outset. In other words, a party must put its best foot forward at the first opportunity. Mr. Blank is simply

attempting to supplement his record years after cross-examination on an issue that has been central to his application since the outset. He has provided no real justification for this and the problem has been brought to his attention before. Under these circumstances, to accept these affidavits as being properly before the Court does not serve the interests of justice, particularly when the February 26, 2013 affidavit contains the Higgins affidavit as an exhibit, upon which the Applicant places strong reliance and which is hearsay evidence upon that the Respondent could not cross-examine on at any time.

[34] I also note the recent decision of Justice Brown, *Blank v Canada (Minister of Justice)*, 2015 FC 753 in which Mr. Blank was denied the right to file affidavits in similar circumstances to the situation before me. Much of what Justice Brown had to say in that case is applicable to the present case.

C. *The Principal Assertion*

[35] At the heart of this application is Mr. Blank's assertion that the prosecutorial misconduct he was subjected to in the past was so egregious that, as a matter of law, it vitiates the ss 21 and 23 exemptions relied upon to deny him some of the documentation he requested. Indeed, he appears to be of the view that those parties involved in processing his request are conspiring to deny him the information he needs to advance his civil claim.

[36] As regards the law, Mr. Blank takes the position that the governing jurisprudence supports his position that the prosecutorial conduct to which he was subjected vitiates the ss 21

and 23 exemptions relied upon to deny disclosure of some materials, and even vitiates legal advice privilege. He has referred the Court to a number of cases to support this assertion.

[37] First of all, he says that one of his own cases that went all the way to the Supreme Court of Canada, *Blank* SCC 2006, above, stands for the proposition that legal advice privilege, as well as litigation privilege, is suspended upon a *prima facie* showing of actionable misconduct. He relies upon paragraphs 45, 55-57 of that decision:

> [45] Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.
>
> […]
>
> [55] Finally, we should not disregard the origins of this dispute between the respondent and the Minister. It arose in the context of a criminal prosecution by the Crown against the respondent. In criminal proceedings, the accused's right to discovery is constitutionally guaranteed. The prosecution is obliged under *Stinchcombe* to make available to the accused all relevant information if there is a "reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence ..." (p. 340). This added burden of disclosure is placed on the Crown in light of its overwhelming advantage in resources and the corresponding risk that the accused might otherwise be unfairly disadvantaged.
>
> [56] I am not unmindful of the fact that *Stinchcombe* does not require the prosecution to disclose everything in its file, privileged or not. Materials that might in civil proceedings be covered by one privilege or another will nonetheless be subject, in the criminal context, to the "innocence at stake" exception — at the very least: see *McClure*. In criminal proceedings, as the Court noted in *Stinchcombe*:

> The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. [p. 340]
>
> [57] On any view of the matter, I would think it incongruous if the litigation privilege were found in civil proceedings to insulate the Crown from the disclosure it was bound but failed to provide in criminal proceedings that have ended.

[38] As I explained and discussed with Mr. Blank at the hearing before me, I do not think this case is of assistance to him. In fact, I think it assists the Respondent.

[39] *Blank* SCC 2006, above, grew out of a s 41 review application, but it dealt with litigation privilege and the Supreme Court of Canada took great pains to distinguish between litigation privilege and legal advice privilege:

> [8] As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.
>
> […]
>
> [14] This appeal concerns the respondent's repeated attempts to obtain documents from the government. He succeeded only in part. His requests for information in the penal proceedings and under the *Access Act* were denied by the government on various grounds, including "solicitor-client privilege". The issue before us now relates solely to the *Access Act* proceedings. We have not been asked to decide whether the Crown properly fulfilled, in the criminal proceedings, its disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. And in the record before us, we would in any event be unable to do so.

[…]

[26] Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[27] Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[…]

[29] With the exception of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129, a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege: *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), 76 O.R. (3d) 401; *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 *("Big Canoe")*; *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, 2001 MBCA 11; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, 2000 NSCA 96; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321.

[30] American and English authorities are to the same effect: see *In re L. (A Minor)*, [1997] A.C. 16 (H.L.); *Three Rivers*

District Council v. Governor and Company of the Bank of England (No. 6), [2004] Q.B. 916, [2004] EWCA Civ 218, and *Hickman v. Taylor*, 329 U.S. 495 (1947). In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar "attorney work product" doctrine. This "distinct rationale" theory is also supported by the majority of academics: Sharpe; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 745-46; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 197-98; J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 868-71; G. D. Watson and F. Au, "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (1998), 77 *Can. Bar Rev*. 315. For the opposing view, see J. D. Wilson, "Privilege in Experts' Working Papers" (1997), 76 *Can. Bar Rev*. 346, and "Privilege: Watson & Au (1998) 77 Can. Bar Rev. 346: REJOINDER: 'It's Elementary My Dear Watson'" (1998), 77 Can. *Bar Rev*. *549*.

[…]

[33] In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

[34] The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[35] Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary," to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

[36] I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege*: Boulianne v. Flynn*, [1970] 3 O.R. 84; *Wujda v.*

> *Smith* (1974), 49 D.L.R. (3d) 476; *Meaney v. Busby* (1977), 15 O.R. (2d) 71; *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134. See also Sopinka, Lederman and Bryant; Paciocco and Stuesser.
>
> [37] Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.
>
> […]
>
> [42] In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the *Access Act*, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is the alleged pollution and breach of reporting requirements by the respondent and his company.
>
> [43] The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.
>
> [44] The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

[40] Anything which the Supreme Court of Canada said about legal advice privilege in *Blank* SCC 2006, above, was, strictly speaking, *obiter*, but it is clear that the Supreme Court of Canada was of the view that solicitor-client legal advice privilege is "absolute in scope" and "permanent in duration." Supreme Court of Canada jurisprudence directly on point suggests that there is an

exception to this general rule. In *Blood Tribe*, above, at paragraph 10, however, the Supreme Court of Canada made it clear just how narrow this exception is:

> At the time the employer in this case consulted its lawyer, litigation may or may not have been in contemplation. It does not matter. While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 885-87; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18, at paras. 40-47; *McClure*, at paras. 23-27; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39, at para. 26; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8. A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes: *Descôteaux*, at p. 881; *R. v. Campbell*, [1999] 1 S.C.R. 565. The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance" (*McClure*, at para. 35).

[41] So I think we can say that the Supreme Court of Canada has made it clear that solicitor-client privilege generally must be maintained as close to absolute as possible to ensure public confidence and retain relevance. Litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Solicitor-client legal advice privilege, however, is absolute in scope and permanent in duration unless the communications in question are criminal in themselves or intended to further criminal purposes.

[42] Mr. Blank referred the Court to other cases which he believes establish a wider exception to the "absolute scope" of legal advice privilege. In particular he raises *Goldman, Sachs & Co v Sessions* (1999), 38 CPC (4th) 143, [1999] BCJ no 2815 (QL)(SC); *Krieger*, above; *Dublin v Montessori Jewish Day School of Toronto* (2007), 281 DLR (4th) 366, 85 OR (3d) 511 (SCJ) [*Dublin*]; *Bronskill v Canada (Canadian Heritage)*, 2011 FC 983 [*Bronskill*].

[43] In *Dublin*, above, Justice Perell of the Ontario Superior Court of Justice, provides a summary of what he sees as the relevant jurisprudence:

> [28] In order to ensure public confidence in the legal system and the effectiveness of the privilege, lawyer-and-client privilege is categorical and approaches an absolute right, rather than one that is decided on a case-by-case basis: *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209 (S.C.C.); *R. v. McClure*, [2001] 1 S.C.R. 445 (S.C.C.); *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 (S.C.C.), affg. (2003), 63 O.R. (3d) 97 (Ont. C.A.). Exceptions to the lawyer-and-client privilege are possible, but their availability is strictly limited.
>
> [29] No privilege is absolute, and there are exceptions to lawyer-and-client privilege and the other privileges: *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.). If a client seeks guidance from a lawyer to facilitate committing a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is a knowing participant or unwitting dupe of the client.
>
> [30] The classic example of an exception to lawyer-and-client privilege is *R. v. Cox* (1884), 14 Q.B.D. 153 (Eng. C.C.R.), a stated case in criminal proceedings. In this case, after judgment had been issued against him in civil proceedings for libel, Railton executed a bill of sale of his newspaper. Railton was convicted of fraudulently conveying his assets to avoid his judgment creditor, and the crucial evidence came from a Mr. Goodman, the lawyer who had provided Railton with legal advice that there had to be a *bona fide* sale of the property. It may be noted that Mr. Goodman's advice itself appears to have been proper legal advice.
>
> [31] On appeal, the question for the Court for Crown Cases Reserved was whether Goodman's evidence was properly admitted or whether it should have been excluded because of lawyer-and-

client privilege. The case was first argued before five judges, and then, because of its importance, reargued before 10 judges. In the result, the court upheld the conviction and ruled that the evidence was properly admitted.

[32] Stephen, J. concluded that if a client attends on a legal adviser for advice intended to facilitate or to guide the client in committing a crime or fraud, the communication between the two is not privileged and can be disclosed by the lawyer. He stated that a communication in furtherance of a criminal purpose does not come within the ordinary scope of professional employment and is not privileged.

[33] For the future crime or fraud exception to apply, it must be shown that the client had an illegal purpose in mind and that the lawyer either shared that illegal purpose or was deceived as to the client's purpose. In other words, the exception applies only where the client knows or should have known that the intended conduct was unlawful: *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.) paras. 55-61.

[34] The client's intention to commit a wrongful act is the key determinant as to whether the communication is privileged: *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143 (B.C. S.C.). In circumstances where the client has a wrongful intent, the lawyer, in providing advice that may facilitate the illegal activity, is not acting in a professional capacity. In contrast, if a lawyer bona fide communicates advice about the legality of proposed conduct, which is a normal and important function for a lawyer, then the communication is privileged, even if it turns out that the lawyer was wrong in advising that the conduct was legal: the privilege is not destroyed if the transaction turns out to be illegal: *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.) paras. 55-61.

[…]

[38] The authors of Canada's leading evidence text, Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada* (2nd ed.) (Markham: LexisNexis Canada Inc., 1999) state in para. 14.58: "There is no reason why this exception to the solicitor-client privilege should not also include those communications made with a view to perpetrating tortuous conduct which may become the subject of criminal proceedings."

[39] In my opinion, there is also no reason why the exception should not include communications perpetrating tortuous conduct that may become the subject of civil proceedings.

[40] In *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143 (B.C. S.C.), K.J. Smith J. included within the scope of conduct that will remove a communication from the protection, the tort of abuse of process, breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty. See also *Northwest Mettech Corp. v. Metcon Services Ltd.* (1997), 78 C.P.R. (3d) 86 (B.C. S.C. [In Chambers]), where it was held that the crime and fraud exception may apply where the alleged unlawful conduct is a breach of fiduciary duty or a breach of confidence. It may be noted that these types of allegations are made in the case at bar.

[41] K.J. Smith, J. came to his conclusion about the scope of the exception to lawyer-and-client privilege by his reading of Binnie, J.'s judgment in *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.), which in turn was an interpretation of the seminal *R. v. Cox* (1884), 14 Q.B.D. 153 (Eng. C.C.R.). In paragraphs 13 to 15 of his judgment, K.J. Smith, J. discussed Binnie, J.'s judgment and stated:

> 13. Binnie J. went on to observe, in para. 57, that Professor Wigmore expressed the view, in Wigmore on Evidence, vol. 8 (McNaughton Rev. 1961) sec. 2298, at p. 573, that the exception applies only where the client seeks the legal advice for a knowingly unlawful end. He continued, at para. 58:
>
> > Although the issue has apparently not been directly considered in the Canadian case law, the Wigmore view was subsequently espoused by the authors of "*The Future Crime or Tort Exception to Communications Privileges*" (1964), 77 Harv. L. Rev. 730, where they state as follows, at pp. 730-31:
> >
> > The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's assistance is sought in activity that the client knows to constitute a crime or tort. [Emphasis per Binnie J.]
>
> The scope of the "future crimes" exception is circumscribed on a public policy basis, as explained at p. 731:
>
> > The knowledge requirement minimizes the effect of the exception on proper

> communications; absent this requirement legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged. Moreover, counseling against unfounded claims or illegal projects is an important part of the lawyer's function.

14. After noting, in para. 59, that this explanation of the rule is consistent with its exposition in the context of crime and fraud by Lamer J. in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 881 and by *Lord Parmoor in O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), at p. 621, Binnie J. made it clear that the client's intention is the pivotal consideration, quoting with approval from *State ex rel. North Pacific Lumber Co. v. Unis*, 579 P.2d 1291 (Or. 1978) at p. 1295 as follows:

> We approve of the requirement that, in order to invoke the exception to the privilege, the proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper.

15. The conduct in issue in *R. v. Campbell* was criminal conduct. However, the adoption into the analysis by the Court, without qualification, of the words "crime or tort" and "unfounded claims or illegal projects" from the journal article referred to leads, in my opinion, to the conclusions that the Court had in mind the proper delimitation of the scope of the rule and that it does not consider that "unlawful conduct" is confined strictly to criminal and fraudulent conduct.

[42] As I understand K.J. Smith, J.,'s analysis, it advances the proposition that if it can be shown that the client communicated with a lawyer with the intention of committing an unlawful act, be it criminal or tortuous, because the client knew or ought to have known that the intended conduct was unlawful, then the

> communication with the lawyer is not privileged. See also: *McIntosh Estates Ltd. v. Surrey (City),* [1996] B.C.J. No. 2008 (B.C. S.C.), affd. [1997] B.C.J. No. 2030 (B.C. C.A.).
>
> [43] However, a mere assertion that the lawyer's advice was sought in furtherance of an illegal purpose would not be sufficient; some convincing evidence of the illegal purpose is required: *O'Rourke v. Darbishire* (1918), [1919] 1 Ch. 320 (Eng. C.A.), affd. [1920] A.C. 581 (U.K. H.L.) *O'Rourke v. Darbishire*; *Goodman & Carr v. Minister of National Revenue*, [1968] O.J. No. 1248 (Ont. H.C.); *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, [2007] B.C.J. No. 179 (B.C. S.C.); *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143 (B.C. S.C.); *Nanaimo Immigrant Settlement Society v. British Columbia*, [2003] B.C.J. No. 2305 (B.C. S.C.). The party challenging lawyer-and-client privilege on the grounds of fraud or criminal activity must make out a *prima facie* case of fraud before the privilege is lost: *O'Rourke v. Darbishire* (1918), [1919] 1 Ch. 320 (Eng. C.A.), affd. [1920] A.C. 581 (U.K. H.L.) *O'Rourke v. Darbishire; Sperry Corp. v. John Deere Ltd.* (1984), 82 C.P.R. (2d) 1 (Fed. T.D.*); Silverman v. Morresi* (1982), 28 C.P.C. 239 (Ont. Master).
>
> [44] In my opinion, the exception for communications to facilitate the commission of a crime or a fraud applies to the circumstances of the case at bar, which concern the commission of various intentional torts against Dr. Dublin and his son.

[44] Having provided his position, Justice Perell then acknowledges that there are competing authorities:

> [47] I acknowledge, however, that my conclusion may be contentious. In *Rocking Chair Plaza (Bramalea) Ltd. v. Brampton (City)* (1988), 29 C.P.C. (2d) 82 (Ont. H.C.), which is a case decided before *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.), the plaintiffs asked that the fraud exception be extended to include communications between solicitor and client that facilitated acts of negligence, malicious prosecution, abuse of process, and charter violation. Relying on the English case, *Crescent Farms (Sidcup) Sports Ltd. v. Sterling Officers Ltd.*, [1967] 1 Ch. D. 533, O'Driscoll, J. refused to extend generally the ambit of the exception for communications in furtherance of unlawful conduct to cover all torts.

> [48] However, O'Driscoll, J. defined fraud to include all forms of fraud and dishonesty such as fraudulent breaches of trust, fraudulent conspiracy, trickery, and sham contrivances. As already noted, the Dublins in the case at bar sue for breach of trust.
>
> [49] In *Hallstone Products Ltd. v. Canada (Customs & Revenue Agency)*, [2004] O.J. No. 496 (Ont. Master), Master Dash decided that while the ambit of the exception for communications in furtherance of unlawful conduct did not extend to all torts, it did extend to acts that were an abuse of the court's process including abuse of the criminal process, deliberate suppression of evidence, and malicious prosecution for an improper purpose.

[45] In *Krieger*, above, the Supreme Court of Canada ruled that a law society possesses the jurisdiction to review an allegation that a Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information, but the jurisdiction is limited to examining whether it is an ethical violation. I am not engaged in such a review and, in my view, this case does not support Mr. Blank's position in his s 41 review application before me.

[46] In *Bronskill*, above, my colleague, Justice Noël, made general comments arising from the facts under review in that case and the s 15 exemption under the Act. Justice Noël said that "the Act's exemptions are not to be validated by the Court when used to prevent embarrassment or to hide illegal acts…," but this does not assist me in dealing with ss 21 and 23 exemptions and what may qualify as an exception to legal advice privilege. In other words, what kind of illegal act would terminate legal advice privilege under the Act.

[47] In summary, in *Dublin*, above, Justice Perell relies on case law from various jurisdictions and levels of court, but he fails to reconcile that case law with the Supreme Court of Canada jurisprudence. His decision was released before *Blood Tribe*, above, so it may have seemed that

the Supreme Court of Canada was stepping back from the absolute nature of solicitor-client privilege in *Blank* SCC 2006. But *Blank* SCC 2006 did not actually limit the importance and broad scope that the Supreme Court of Canada has placed on legal advice privilege. Justice Perell fails to reconcile his reliance upon these cases with his opening acknowledgement that solicitor-client privilege is nearly absolute right (at para 28) for which point he relies upon three Supreme Court of Canada cases. He goes on to note that various jurisdictions and levels of courts and commentators have suggested that the exceptions should be expanded, and he finds this view persuasive, but he never reconciles this with the fact that the Supreme Court of Canada has said that solicitor-client privilege is nearly absolute. In my view, that has to be the guiding principle in the present case.

[48] In *Blank* FCA 2010, the Federal Court of Appeal held that the only exceptions to solicitor-client privilege were criminal conduct or to perpetuate a tort (at para 20):

> [20] Further, "misconduct" by itself is not a recognized exception to the privilege that the respondent asserts over the three pages. There is an exception for "communication[s] in furtherance of a criminal purpose" or to perpetuate a tort: *Solosky v. Canada*, [1980] 1 S.C.R. 821 at pages 755-757 and Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at pages 937-939. Where clients seek out a lawyer "for the purpose of assisting [them] to perpetuate a crime or fraud, there [is] no privilege": Bryant et al., *supra* at page 937.

[49] The Supreme Court of Canada decision cited, however, does not provide for any exception relating to torts (*Solosky v Canada*, [1980] 1 SCR 821 at 835-836, footnotes omitted):

> There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not

> intended to be confidential, privilege will not attach, *O'Shea v. Woods*, at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton*, in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

[50] This suggests that either the Federal Court of Appeal expanded the Supreme Court of Canada's use of "fraud" to all torts, or the evidence text cited discusses the exemption of communications relating to torts. It is not clear from the Federal Court of Appeal's analysis whether "tort" was intended to be limited to fraudulent conduct or all torts:

> [21] This exception does not apply to the three pages that the appellant seeks. During the course of the hearing, the appellant invited the Court to examine these three pages, which were appended to a confidential affidavit before this Court. The respondent did not object to this Court reviewing these pages. Having reviewed these pages, I conclude that there is no basis for this Court overturning the Federal Court's conclusion that these pages are privileged. Further, these pages are not "communication[s] in furtherance of a criminal purpose" or to perpetuate a tort and so the documents remain privileged.

[51] In a more recent case, the Supreme Court of Canada, again, confirmed that solicitor-client privilege is a near absolute right (*Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 [*Criminal Lawyers' Association*]). The Supreme Court of Canada made no mention of the criminal or fraud or tort exceptions and says that the only exception is "public safety and the right to make full answer and defence":

> [53] The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. Section 19 of the Act provides that a head "may refuse to disclose a record that is subject to solicitor-client privilege or

> that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 836; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875; *Campbell*, at para. 49; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 35 and 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 36-37; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission*), 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185.

[52] An exception for misconduct has been explicitly rejected by the Federal Court of Appeal. It is hard to believe that there is an exception for communications which perpetuate a tort in light of the Supreme Court of Canada's clear language. The Supreme Court of Canada has yet to provide a clear answer on what exactly is not protected by solicitor-client privilege. In *Blood Tribe*, above, the Supreme Court of Canada said that there was a "rare exception" for criminal communications. In *Criminal Lawyers' Association*, above, the Supreme Court of Canada said that the only two exceptions were for public safety and the right to make full answer and defence. Neither apply in the present case.

[53] In the end, and notwithstanding Justice Perell's views as to what should be exempted from solicitor-client privilege (which he acknowledged were contentious), I think I have to be guided by Supreme Court of Canada jurisprudence. I am left with the Supreme Court of Canada

decision in *Blank* SCC 2006 and *Blood Tribe*, both above. This means, in my view, that I must treat legal advice privilege as absolute in scope and permanent in duration unless Mr. Blank can establish that the communications at issue in this s 41 application were "criminal in themselves or intended to further a criminal purpose."

[54] Mr. Blank has alleged prosecutorial misconduct, abuse of process, possible tortious conduct and possible criminal conduct (perjury), as justification for the vitiation of ss 21 and 23 privileges in this case. Given the Federal Court of Appeal's guidance in *Blank* FCA 2010, above, I will also examine whether any of the communications at issue perpetuate a tort.

[55] In this application Mr. Blank is seeking relief that both this Court and the Federal Court of Appeal have previously told him is not available under s 41 of the Act. See *Blank* FC 2000; *Blank* FCA 2004; *Blank* FC 2006, aff'd *Blank* FCA 2007, all above.

[56] The jurisprudence on s 41 is clear that the right to seek review in this Court is narrowly circumstanced and is set out in ss 41 through 53 of the Act. Briefly stated, the Court's reviewing authority only comes into play where access to a specific record has been refused, and the only relief the Court can provide is to order access to the record at issue if the refusal was contrary to the Act. See, for example, *X v Canada*, above, at para 10; *Connolly*, above, at paras 8-10, aff'd *Connolly* FCA, above.

[57] In effect, the only assistance the Court can render Mr. Blank in this application is to review the refused documents against the claimed exemptions and decide whether he should be

given access to those documents in whole or in part. Notwithstanding Mr. Blank's lack of input on the criteria for review, I have examined each document in turn and determined that each exemption was correctly claimed and the discretion was reasonably exercised. I have also determined that the exemptions are not vitiated by any kind of wrongdoing. The Court cannot grant Mr. Blank disclosure of the documents at issue.

[58] As the issues raised by Mr. Blank reveal, he is attempting to intermingle access to information issues with issues that arise in his longstanding civil claim for prosecutorial misconduct. Mr. Blank takes the position that the DOJ is deliberately withholding documentation related to the prosecution of Mr. Blank and his company that was initiated by Environment Canada. He appears to believe that if this documentation is disclosed it will provide him with the evidence he needs to succeed in his civil suit. This is why, in his disclosure request, he asked for documents "dealing with the continuation of the prosecution by indictment" and "dealing with the eventual decision to stay the proceedings." In other words, Mr. Blank assumes that he is entitled to receive documentation that is inevitably protected by solicitor-client privilege. The basis for this assumption appears to be that solicitor-client privilege in this case is being used to conceal evidence of wrongdoing in the form of some kind of abuse of process, and that this vitiates the exemption claim.

[59] Having examined the non-redacted documentation in question, I find I have to agree with the Respondent in that:

a) The s 23 exemption for solicitor-client privilege was correctly claimed because the documents in question are letters, memoranda and e-mail communications that expressly

or implicitly reference legal advice with regard to the prosecutorial decisions that the Applicant references in his request for information;

b) The solicitor-client privilege claim was not vitiated by abuse of process or any other wrongdoing, let alone the criminal conduct required under *Blood Tribe*, above. These communications are not criminal in themselves and there is no evidence that they are intended to further criminal purposes or to perpetuate any tort;

c) The exercise of the discretion to deny access to documents under s 23 was exercised reasonably and in good faith in this case, and in accordance with the wording of s 23;

d) As regards those documents (or redacted parts of documents) that were said to attract the s 21(1) exemption, the determination that the withheld materials attract the exemption was correct in that the materials record consultations and deliberations between and amongst government employees (including legal counsel) that concern advice and recommendations with regard to the two prosecutorial decisions that were referenced in Mr. Blank's request for disclosure. The redacted portions contain government advice, consultations, deliberations and recommendations;

e) The s 21 exemption was exercised reasonably and in good faith; and,

f) For those documents where severance was applied, reasonable severance occurred in accordance with s 25 of the Act and in accordance with the guidance on severance provided by the Federal Court of Appeal in previous applications involving Mr. Blank. See *Sheldon Blank & Gateway Industries Ltd v Canada (Minister of the Environment)*,

2001 FCA 374, *Blank* FCA 2004, above; *Canada (Justice) v Blank*, 2007 FCA 87; *Blank* FCA 2007.

[60] Given the narrow range of review which the jurisprudence says is available to Mr. Blank under s 41 of the Act, the Court cannot consider Mr. Blank's complaints that the response to his request was tardy and was not rendered in accordance with s 4(2.1) of the Act. The ICC has already addressed this complaint. Mr. Blank alleges bias against the ICC, but there is no real evidence to support this allegation, so that the ICC's decision in this case is entitled to the usual deference. See *Blank* FCA 2005, above, at para 12; *Blank* FC 2009, above, at para 26; *Blank* FCA 2010, above, at para 35.

[61] The Respondent has submitted a draft bill of costs in this matter, in the amount of $10,850.00, but I think it would be appropriate to fix costs at $5,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed with costs to the Respondent (Minister of Justice) in the amount of $5,000.00.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-955-10
STYLE OF CAUSE:	SHELDON BLANK v THE MINISTER OF JUSTICE
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JUNE 15-16, 2015
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	AUGUST 7, 2015

APPEARANCES:

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